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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930. No. 720

WALTER C. FETTERS, United States Marshal for the Eastern District of Pennsylvania,
Petitioner,

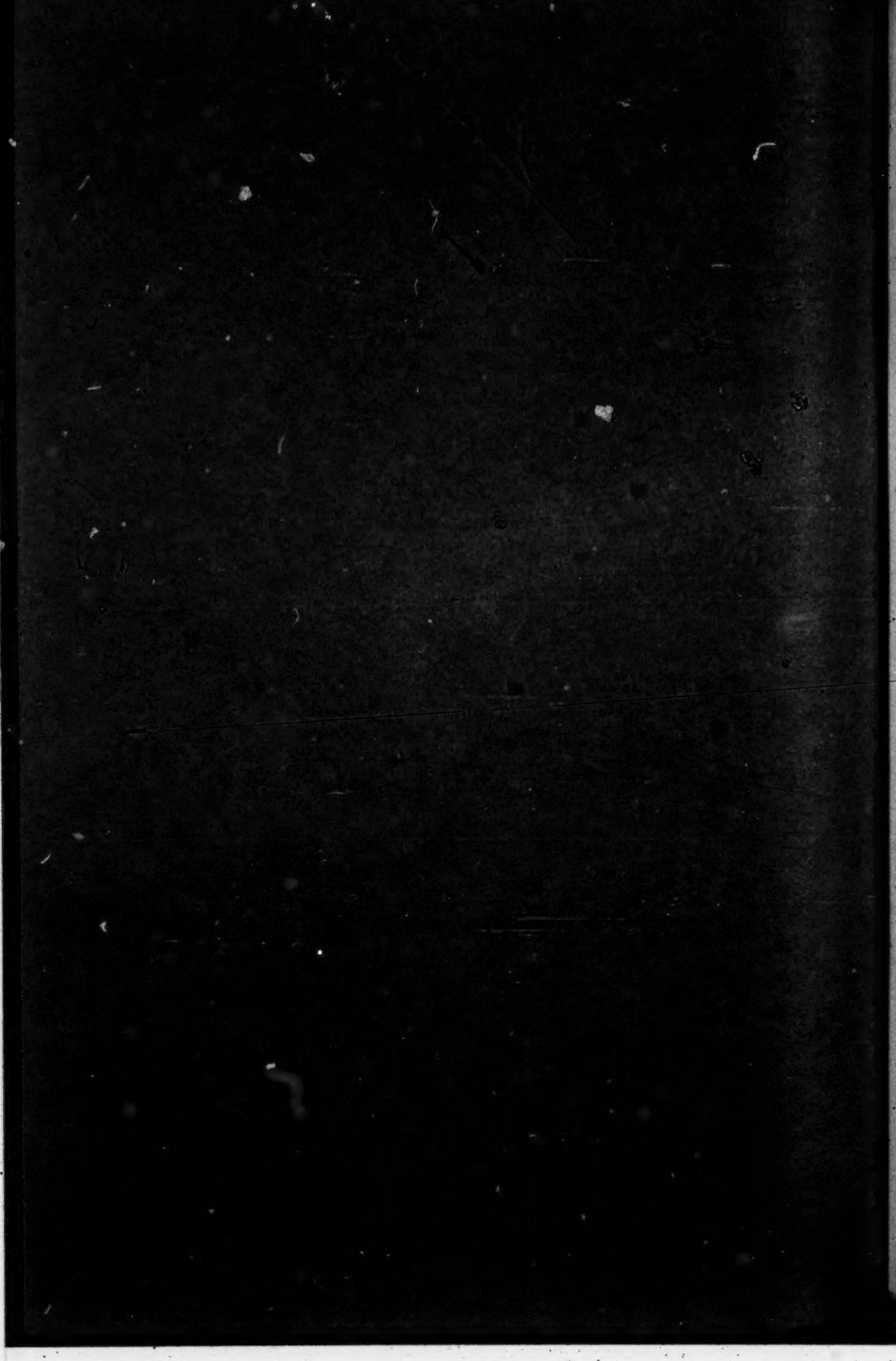
vs.

THE UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM,
Respondent.

Respondent's Brief Against Allowance of Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

October Term, 1930. No.

WALTER C. FETTERS, United States Marshal for the Eastern District of Pennsylvania,

Petitioner,

vs.

THE UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM,

Respondent.

RESPONDENT'S BRIEF AGAINST ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL STATEMENT.

The statement made in the petition should be supplemented by the essential facts stated in the opinion filed by Buffington, C. J., in the Circuit Court of Appeals in the former habeas corpus proceeding, which was made a part of the return in the instant proceedings (R. 103); since as concluded by Judge Dickinson in the District Court (R. 104, 106), that opinion determines the law of the case and made necessary respondent's discharge in the instant proceedings, which by him was ordered (R. 107). That opinion states (33 F (2d) 261):

"On May 18, 1926, a primary election was held in Pennsylvania and William S. Vare received the Republican nomination as a candidate for the United States Senate. At the general election held on November 2, 1926, he was elected United States Senator. Thereafter a petition was presented to the Senate contesting his election on the ground that fraudulent and unlawful practices were used in connection therewith.

On May 19, 1926, the Senate of the United States by resolution 195 created a committee of five members and authorized and instructed it,

'To investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made or expended, or shall hereafter be promised, contributed, expended or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall, hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto * * *

'The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee wilfully makes default, or

who, having appeared, refused to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by Section 102 of the Revised Statutes of the United States.

Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

Pursuant to the resolution, the committee held a meeting at Washington in the District of Columbia, on February 21, 1927, at which the relator appeared in obedience to a summons of the committee but refused to answer certain questions asked by the committee on the ground that they related to his personal business and were not pertinent to the investigation authorized by the Senate.

The relator was thereafter on April 20, 1928, indicted by a grand jury in the Supreme Court of the District of Columbia, for refusing to answer the questions, which related to his contribution of $50,000 to Mr. Thomas F. Watson, chairman of the City Committee of Philadelphia, for use in the Primary election, in which William S. Vare was nominated.

The indictment contains six counts. The questions and answers follow:

FIRST COUNT.

"Mr. Cunningham: I handed money to Thomas F. Watson $25,000 on the 10th day of April, 1926.

The Chairman: Where did you get that money?

Mr. Cunningham: I got that money out of my own private funds.

The Chairman: How is that?

Mr. Cunningham: Out of my own private funds.

Mr. Chairman: Your own private moneys:

Mr. Cunningham: Yes, sir; my own money, my own money.

The Chairman: How long had it been your own money?

Mr. Golder at that time stated an objection, which appears in the record.

The question was repeated as follows (reading):

The Chairman: How long had it been your own money?

Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business."

SECOND COUNT.

"The Chairman: Where did you get this $25,000 you say you gave to Mr. Watson?

Mr. Cunningham: I refuse to answer that question, I think that is personal."

THIRD COUNT.

"The Chairman: Where were you keeping the $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: That is another personal question, Senator. I refuse to answer it."

FOURTH COUNT.

"The Chairman: Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. Cunningham: Yes, sir.

Mr. Chairman: Where did you get it from to put in your pocket?

Mr. Cunningham: That is a personal question, and I decline to answer it.

FIFTH COUNT.

"The Chairman: Mr. Cunningham, how long had you had this money in your possession?

Mr. Cunningham: That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got it, or anything else about it."

SIXTH COUNT.

"The Chairman: Was this money which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. Cunningham: That is another personal question. I cannot answer that."

On an affidavit of S. Busha, a warrant was issued and the relator was arrested and brought before Judge Dickinson who appears to have sat in three proceedings: 1. Committing magistrate, 2. Motion for warrant of removal, and 3. Hearing upon writ of habeas corpus.

As above stated, the writ or habeas corpus was dismissed, the warrant for removal was allowed and the relator was remanded to the custody of the United States Marshal for removal to the District of Columbia.

An appeal was taken and the question before us is

whether or not probable cause of the relator's guilt is sufficient to justify his removal for trial."

The Circuit Court of Appeals in an opinion by Buffington, C. J., with Davis, C. J., concurring and Woolley, C. J., dissenting, reversed Judge Dickinson's judgment on the ground that "prima facie evidence of probable cause which the indictment established is overcome by its own terms in failing to charge a crime," because the questions propounded were not pertinent (33 F (2d) 261).

After the decision of the Supreme Court of the United States in Barry vs. Cunningham (1929) 279 U. S. 597, a petition for reargument was filed, which averred that the decision of the Circuit Court of Appeals was at variance with the holdings of this Court in that case and the cases following:

Rodman vs. Pothier (1923), 264 U. S. 399;
Morse vs. United States (1924), 267 U. S. 83, and
Henry vs. Henkel (1914), 235 U. S. 219.

On rehearing, the Circuit Court of Appeals, in its opinion which is printed at the end of this book, marked Appendix "A", said:

> "We adhere to our previous opinion, and in doing so, we do not, in our view, disregard the holdings of the Supreme Court." The final judgment was then entered "with instructions to discharge the relator."

Petition for writ of certiorari and suggestion of abatement, because of failure to substitute, within the statutory period, the successor of the marshal who had gone out of office, were filed in this court; which on October 27th, 1930, granted the writ, vacated the judgments of the courts below and remanded the cause to the District Court with directions to dismiss the proceedings as abated. Mathues vs. United States Ex rel. Cunningham (1930), 282 U. S. 123.

Respondent surrendered himself to Fetters, the United States Marshal in office, filed his new petition for writ of habeas corpus (R. 3-5) to which a return was filed (R. 37-101) and traversed (R. 102).

It was stipulated by counsel that "the hearing * * * shall be determined upon the petition, the writ, the return * * * and traverse to the return, including the former habeas corpus proceeding."

Judge Dickinson concluded that "the law of the case * * * is what the Circuit Court of Appeals has declared it to be" U. S. ex rel. Cunningham vs. Mathues, 33 (2d) F. R. 261, on December 23rd, 1930, entered an order discharging the respondent (R. 107).

On the same date an appeal to the Circuit Court of Appeals (R. 110) was allowed and docketed as of March Term, 1931, No. 4543, with no further proceedings taken except the filing of the transcript of record therein.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

REMOVAL PROCEEDINGS—PROBABLE CAUSE—INDICTMENT PRIMA FACIE, NOT CONCLUSIVE—JURISDICTION OF REMANDING COURT—PERTINENCY.

(1)

On writ of habeas corpus in removal proceedings may the remanding court consider the indictment as prima facie but not conclusive evidence of the existence of a crime in its determination of the inquiry of probable cause, or has the court of trial exclusive jurisdiction to determine the existence of a crime.

(2)

Where all the proofs constituting the crime charged are contained in the indictment, may the prima facie evi-

dence of probable cause established by the indictment be overcome by its own counts if without doubt they do not charge a crime.

(3)

Are the questions propounded, which respondent's refusal to answer constitutes the crime charged under Section 102 R. S. "pertinent" to the investigation authorized by Senate Resolution 195 of the 69th Congress.

ARGUMENT.

Section 1014 of the Revised Statutes (U. S. C. Title 18, Sec. 591) makes the fact of probable cause of (1) the existence of a crime and (2) the guilt and (3) identity of the accused, the inquiry in removal proceedings.

The existence of a crime or the guilt of the accused prima facie may be established at the hearing of a petition for habeas corpus by introducing in evidence the indictment or by other proofs without the production of the indictment.

Distinction Between Indictment As A Pleading And As a Fact Evidential Of Probable Cause.

The distinction is clear between an indictment as a pleading in a criminal case and as a fact evidential of probable cause under a habeas corpus in removal proceedings.

The thread of differentiation announced by this court in Pierce vs. Creecy (1907) 210 U. S. 397, and repeated and applied in Rodman vs. Pothier (1923), 264 U. S. 399; Henry vs. Henkel (1914), 235 U. S. 219 and Morse vs. United States (1924), 267 U. S. 83, and which runs through all the reported cases considered by either the District Courts or the Circuit Courts of Appeal of the United

States, is that in removal proceedings the court of asylum will not pass upon the sufficiency of the indictment as a formal pleading, but may consider the indictment as a fact with other facts in the proofs as evidential of the existence of a crime in its determination of the controlling inquiry of probable cause. The reason for this is evident, for unless the trial court is given plenary jurisdiction to determine the sufficiency of its pleadings, e. g. the indictment, the writ of habeas corpus could be made the substitute for a writ of error; and unless the remanding court may weigh the offense as charged in the indictment with all the other proofs, all the facts evidential of probable cause, or its lack, will not have been considered, and the most essential or persuasive consideration in reaching a conclusion will have been ignored, viz., *the existence of a crime.*

In the instant proceedings the sufficiency of the indictment is not challenged as a formal pleading, but is attacked as a fact in the proofs evidential of the existence of a crime in the determination of the controlling inquiry of probable cause and this because its counts do not show the existence of a crime.

Petitioner's Error.

It is the confounding of the indictment as a formal pleading with its use as a fact in the proofs which leads petitioner to the erroneous contention contained in the last paragraph, pg. 10, of his argument, that since the indictment sets forth the questions of disputed pertinency and alleges them to be "pertinent", the indictment is conclusive of probable cause and gives to the trial court exclusive and sole jurisdiction for the determination of that fact.

Conclusion of Circuit Court of Appeals.

The Circuit Court of Appeals, following the distinction as announced and repeatedly applied by this court held the indictment was not conclusive but prima facie evidence only

of probable cause, concluded "that the prima facie evidence * * * which the indictment established is overcome by its own terms in failing to charge a crime" because the propounded questions are not pertinent, and ordered the discharge of the respondent.

It is then petitioner's contention that the remanding court is without jurisdiction to determine the existence of a crime and that even though the indictment clearly and without doubt failed to disclose the existence of a crime, nevertheless the accused must be held in custody and remanded to the trial court for judicial determination of this evident fact.

It is submitted that this is oppressive administration of criminal law without reason, which this court has always condemned. The contention (1) fails to observe the purpose of the hearing which Section 1014 of the U. S. Revised Statutes gives the accused and emasculates the statute since it says trial court must decide existence of crime though there is doubt neither as to statutory definition of crime or acts alleged, (2) ignores the distinction between prima facie and conclusive use of the indictment as proof of probable cause, (3) disregards the necessity of finding probable cause, (4) ignores the existence of a crime as the most essential element in the finding of probable cause and (5) disregards the legal conclusions of this court that the question of pertinency is one of law and that the burden of proving pertinency is on petitioner.

Respondent's argument against petitioner's contention and in support of the conclusion and final order of the court below, may be stated and will be developed in the order following:

(1) The indictment is prima facie but not conclusive evidence of probable cause of either the existence of a crime or guilt of the accused.

(2) The indictment as prima facie evidence of probable cause may be overcome by its own terms because not charging a crime.

(3) The indictment does not charge a crime because the questions propounded as set forth in its counts are not "pertinent" to the investigation authorized by the Senate.

I.

THE INDICTMENT IS PRIMA FACIE BUT NOT CONCLUSIVE EVIDENCE OF PROBABLE CAUSE OF EITHER THE EXISTENCE OF A CRIME OR GUILT OF THE ACCUSED.

Few Circuit Courts of Appeal of the United States have so frequently and recently examined the law relating to probable cause in removal proceedings, as the three judges who decided this case.

In United States v. Glass (1928), 25 Fed. (2nd) 941, Judge Woolley writing the opinion of the Court, with the same members sitting, said:

> "The law on removal was correctly stated by the learned trial Judge and was recently reviewed by this Court in United States vs. Mathues, 19 Fed. (2d.) 22, and Swan v. United States, 23 Fed. (2d.) 148 with extended citation of supporting authorities."

He then stated that in the decision of that case he would "pursue the discussion solely on the law which we have before stated as follows:"

> "The indictment is introduced in proceedings under Section 1014, R. S. (18 USCA, Sec. 591), 'not to establish the appellant's guilt, but only as evidence to show that there was cause to believe his guilt probable enough to justify his removal for trial.'"

"The indictment is itself evidence that there was probable cause for finding it. Of this, however, the indictment is not conclusive * * * its evidential effect is only prima facie."

"Hence the accused may attack it as not charging a crime and therefore as not showing probable cause."

The above propositions are stated on the authority of Pierce v. Creecy (1907), 210 U. S. 387, and Morse v. United States (1924), 267 U. S. 81.

In Swan vs. United States (1928), 23 Fed. (2d.) 148, Judge Woolley points out the distinction above adverted to, in the language following:

"The requisite probable cause in removal cases may be proved by the indictment as evidence, or by other evidence without the production of the indictment, or, indeed, in advance of the indictment. * * * *When it is sought to be proved by the indictment, the instrument is prima facie evidence which may be overcome by its own terms when they fail to set forth a crime.* Yet no matter how inartificially it may be drafted, the Commissioner or Judge at a removal hearing has authority to pass upon its effect only in respect to its proof of probable cause. * * * He has no authority to determine the validity of the indictment when offered only as evidence. That is the function of the trial Court."

In *Pierce v. Creecy, supra*, the distinction between the two methods of attack or uses of the indictment in removal proceedings, is said "though narrow, is clear," by Mr. Justice Moody:

"The counsel for the petitioner disclaim the purpose of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not

whether the indictment is good enough, over reasonable challenge, to bring the accused to the bar for trial. *Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear.*"

He then points out that the one and primary inquiry is not the sufficiency of the indictment as a pleading, but, on the contrary, whether the acts set forth in the indictment charge a crime, saying:

> "Before proceeding further, it is well to set forth all the objections to the indictment made by counsel, in order to see whether, if any one of them is well founded, it shows that there was no charge of crime against the petitioner. For if all criticisms of the indictment should be approved, and they leave untouched in the pleading enough to show that the petitioner was charged with crime in the broad and practical sense in which those words ought to be understood, the condition prescribed by the Constitution has been performed."

After considering the separate exceptions, and pointing out that they all present "a mixed question of law and fact," he concludes that:

> "All the other objections are appropriate to a demurrer or a motion to quash or in arrest of judgment. They are attacks upon the indictment as a criminal pleading."

The language following is particularly applicable to the instant case, for he finds that:

> "The indictment, whether good or bad, as a pleading, *unmistakably describes every element of the crime of false swearing.*"

In Morse vs. United States (1924), 267 U. S. 81, the essential facts are stated as follows:

> "Appellants, under indictment in the District of Columbia, while passing through New York on February 6, 1923, on their way to Washington for trial, were arrested and taken from the train by a United States Marshal upon bench warrants issued on Federal indictments found in New York, charging them with fraudulent uses of the mails. Previously, their removal to New York from Connecticut and Massachusetts, respectively, for trial under these indictments, had been sought under Sec. 1014, Rev. Stat. (Com. Stat., Sec. 1674, 2 Fed. Stat. Anno. 2d ed., p. 654). The removal of Harry F. Morse from Connecticut had been granted by the Commissioner, but, upon *habeas corpus* proceedings, he had been discharged from custody by the Connecticut Federal District Court for want of probable cause, principally on the ground that the New York indictment was insufficient to charge a criminal offense (287 Fed. 907), although the New York court had previously held it good."

After a hearing at which the indictments were offered in evidence, together with other proofs, the writs were dismissed and Mr. Justice Sutherland states the second reason in support of error, in the following language:

> "It is urged that the decision of the Federal District Court in Connecticut, discharging Harry F. Morse, was *res adjudicata* and conclusively determined (1) that the New York bench warrant was *illegally issued*, and, therefore, could not be made the basis for the subsequent arrest in New York; and (2) *that the indictment was fatally defective.*"

This Court's answer to the second contention makes clear the distinction, for the learned Justice points out that it

"Proceeds upon a complete misconception of the purpose for which the indictment is produced and considered in removal proceedings, and the authoritative effect of the ruling of the Commissioner and the Court on *habeas corpus* in receipt thereof. The inquiry in such proceedings is whether there is probable cause to believe the prisoner guilty and justify his removal for trial."

He then says:

"The indictment was before the Commissioner simply as evidence for the purpose of establishing or *tending to establish the commission of an offense;* and the Commissioner had authority to pass upon its effect *in that aspect only.*"

He then concludes that neither the Commissioner nor the Court "*had authority to determine the sufficiency of the indictment as a pleading,*" and quotes the following excerpt from Mr. Justice Moody, in *Pierce v. Creecy* (1907), supra:

"*The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been, in fact, however inartificially, charged with crime in the State from which he has fled.*"

In short, in *Morse v. United States, supra,* it was contended (a) that the discharge of an accused in removal proceedings for want of probable cause, was conclusive of his guilt, and (b) that the indictment was insufficient as a criminal pleading, to sustain the charge of crime; and this Court denied both contentions, closing its opinion in the language following:

> "In other words, the Commissioner, or the Court, in review on *habeas corpus*, for lack of power cannot *conclusively adjudge the indictment, qua indictment, to be either good or bad, or pass finally upon the guilt or innocence of the accused.*

Henry v. Henkel (1914), 235 U. S. 219, does not modify either the law or practice as uniformly announced and applied by this Court. Mr. Justice Lamar, however, in the Henry case, emphasizes the fact that *where under all the proofs a doubt exists* as to whether the acts charged in the indictment or proved at the hearing disclose a crime, the removal Court should refuse the writ and remand the issue to the decision of the trial court.

The facts of *Henry v. Henkel* and of the instant case, are similar in so far as the indictment grew out of the refusal to answer questions before a legislative body. They differ, however in essential particulars. The Henry case suggested that the questions asked were neither relevant nor proper, and stressed the unconstitutionality of the Act which required the giving of information which was dishonorable for the witness to disclose. Counsel in that case urged that the unconstitutionality of the statute was so clear as to warrant the removal Court in so deciding as a matter of jurisdiction. This Court was of different opinion, and *expressing doubt as to its constitutionality*, remanded the issue to the trial Court for final decision.

That case did not decide the issue raised in the instant petition, namely, should the removal Court decide as matter of law, that no crime is charged where the acts alleged in the indictment or proved at the hearing, clearly and without doubt, negative as matter both of fact and law, the existence of the crime charged.

Mr. Justice Lamar, on page 225, after referring to the fact that the scope of inquiry under the resolution of the House of Representatives was "the activities of national banks * * * and groups of financiers," says:

"That the witness 'was asked to give the names of those composing the New York syndicate but claimed to have the right under the Constitution to decline to answer the question, saying, also, that he "did not want to disclose the names of the participants in the New York syndicate, although he understood it to be the wish of the subcommittee that he should, for the reason that he would consider it dishonorable to reveal the names of his customers unless compelled to do so."' "

He then states, on page 227, that the defendant argued that, "in view of the provisions of the 4th Amendment to the Constitution, neither House can compel a citizen to disclose his private affairs as a basis for legislation."

"They therefore contend that the papers show on their face that there was no jurisdiction to issue the warrant on which he was held, and that Henry should not be subjected to the hardship of being removed to the District of Columbia to stand trial upon an indictment which affirmatively shows that no crime has been committed."

He then discusses the law, and concludes that the facts of the Henry case are not within the rule announced in the cases relied upon by the petitioner, saying, on page 229:

"Manifestly, this is true as to *disputed* questions of fact, and it is equally so as to *disputed* matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other *controverted* matters of law, and fact are for the determination of the trial Court."

He then reviews the cases in support of his conclu-

sion, but is careful to add the principle, in language which is particularly applicable to the instant case, saying, on page 230:

> "The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute *making an offense of the acts charged.* In such case the committing Court would have no jurisdiction, the prisoner would be in custody without warrant of law, and therefore entitled to his discharge. Greene v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218."

In the succeeding sentence, he then sets forth the rule that a statute should, by the removal Court, be declared unconstitutional only "when plainly and palpably void."

It will then be observed that the Henry case recognizes the practice and announces the rule herein contended for by respondent, who suggests the only inquiry in this case is whether the proofs of the instant proceeding so clearly disclose that the acts charged in the indictment and proved at the trial, do not constitute any crime as to justify the removal Court in so deciding as matter of undisputed law or fact.

Benson v. Henkel (1904), 198 U. S., p. 11, is also an authority in accord with Pierce v. Creecy, supra, and Morse v. U. S., supra. After stating the general rule on page 10, "That the legal sufficiency of the indictment is only to be determined by the Court in which it is found," Mr. Justice Brown says:

> "Of course this rule has its limitations. If the indictment were a mere information, *or obviously, upon inspection, set forth no crime against the United States,* or a wholly different crime from that alleged as the basis for proceedings, or if such crime be

charged to have been committed in another district from that to which the extradiction is sought, the Commissioner could not properly consider it as ground for removal. In such cases resort must be had to other evidence of probable cause."

On the necessity of the indictment setting forth such acts as will charge a crime, the learned Justice says:

"While the principle laid down in some of the earlier cases in this Court, that an indictment upon a statute is ordinarily sufficient if framed in the language of the statutes has been somewhat qualified in later cases, the rule still holds good that where the statute contains every element of the offense, and an indictment is offered in evidence before the extradition Commission as proof of probable cause, it is sufficient if framed in the language of the statute with the ordinary averments of time and place, *and with such a description of the fraud, if that be the basis of the indictment, as will apprise an intelligent man of the nature of the accusation,* notwithstanding that such indictment may be open to motion to quash or motion in arrest of judgment in the court in which it was originally found. An extradition Commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and if the complaint upon which he acts *or the indictment offered in support thereof contains the necessary elements of the offense,* it is sufficient, although a more critical examination may show that the statute does not completely cover the case."

Rodman vs. Pothier, (1923), 264 U. S. 399, does not question, but on the contrary distinctly announces the

law as stated and applied by the Court below. The question involved in the Rodman-Pothier case was whether or not the prima facie of probable cause established by the indictment was overcome by the other facts introduced by the relator. This question depended on whether or not the alleged crime was within the exclusive jurisdiction of the United States, and this in turn on the question whether the United States had acquired title to the land embraced within a certain reservation. The District Court was of opinion that, p. 402:

> "The defendant has failed to overcome the prima facie case made by the indictment and that the evidence fails to show the want of probable cause."

Mr. Justice McReynolds then points out, p. 402 that:

> "The Circuit Court of Appeals (291 Fed. 311) was 'of the opinion that no other conclusion can be drawn from the evidence than that, at the time the crime charged in the indictment was committed, the United States had acquired no title in the land embraced within Camp Lewis Military Reservation.' . . . This being so there is an absolute want of probable cause for the removal of the appellant to answer to the crime charged."

He then gives this Court's conclusion to the contrary, because the principal question of exclusive jurisdiction and collateral question of title to the land involved "*consideration of many facts and seriously controverted questions of law,*" saying on page 402:

> "We think there was enough to show probable cause, and that the judgment of the district court is correct. Whether the locus of the alleged crime was within the exclusive jurisdiction of the United States

demands consideration of many facts and seriously controverted questions of law. As heretofore often pointed out, these matters must be determined by the court where the indictment was found."

At the bottom of page 402, the opinion closes with the statement: that it is because of the presence of disputed questions of fact and controverted matters of law, that these questions were remanded to the trial court.

> "Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court."

The following late case decided by the U. S. Circuit Court of Appeals for Second Circuit, is called to the attention of this Court as in accord with the law as by it announced and applied:

United States ex rel. Brody v. Hecht (1926), 11 Fed. Rep. 2nd Ser. 128, wherein the habeas corpus was sustained on the ground that the indictment and other facts in evidence not being in dispute clearly established that no crime was charged in the indictment.

Circuit Judge Rodgers tersely states the rule as follows, p. 134:

> "It must also be admitted that in a removal proceeding, in which there are disputed questions of fact or disputed matters of law, such controverted matters of law or fact must be left for the determination of the court where the indictment was found, and cannot be decided by the court in which the removal proceeding is heard. * * * *It is, however, an entirely differ-*

ent matter where in such a proceeding there are no disputed questions of fact or of law, and it clearly appears that the offense charged in the indictment was not committed in the district in which the indictment was found."

II.

THE INDICTMENT AS PRIMA FACIE EVIDENCE OF PROBABLE CAUSE MAY BE OVERCOME BY ITS OWN TERMS BECAUSE NOT CHARGING A CRIME.

It was on the authority of Tinsley v. Treat (1906), 205 U. S. 20, that His Honor, Judge Wooley, reached the conclusion in U. S. ex rel. Haim v. Mathues (1927), 19 Fed. Reporter (2d) 22, that the accused may attack the indictment as not charging a crime, and in Swan v. United States, supra, that when probable cause "is sought to be proved by the indictment, the instrument is prima facie evidence which may be overcome by its own terms when they fail to set forth a crime."

In U. S. ex rel. Tassell vs. Mathues (1926), 11 Fed. R. (2nd), 53, Judge Davis says:

> "If the indictment clearly fails to charge a crime, it is bad, and a defendant should not be removed to a district to answer the crime with which he has not been charged."

In *Tinsley v. Treat* (1906), 205 U. S. 20, in an opinion by Mr. Chief Justice Fuller, this Court said:

> "It was held in Beavers v. Henkel, 194 U. S. 73; Benson v. Henkel, 198 U. S. 1; Hyde v. Shrine, 199

U. S. 62, as well as Greene v. Henkel, *supra*, that an indictment constituted *prima facie* evidence of probable cause, but not that it was conclusive.

We regard that question as specifically presented in the present case and we hold that the indictment cannot be treated as conclusive under Section 1014.

This being so, we are of opinion that the evidence offered should have been admitted. It is contended that that evidence was immaterial, and, if admitted, could not have affected the decision of either the District or Circuit Judge. Of course if the indictment were conclusive, any evidence might be said to be immaterial, but if the indictment were only *prima facie*, then evidence tending to show that no offense triable in the Middle District of Tennessee had been committed by defendant in that district could not be regarded as immaterial.

The Constitution provides that 'The trial of all crimes, except in cases of impeachment, shall be by jury and such trial shall be held in the State where the said crimes shall have been committed' (Article III, Section 2); and that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed' (Amendment VI); and in order that any one accused shall not be deprived of this constitutional right, the Judge applied to to remove him from his domicile to a district in another State must find that there is probable cause for believing him to have committed the alleged offense and in such other district. And in doing this his decision does not determine the question of guilt any more than his view that the indictment is enough for the purpose of removal definitely determines its validity.

Appellant was entitled to the judgment of the District Judge as to the existence of probable cause on the evidence that might have been adduced, and even if the District Judge had thereupon determined

that probable cause existed, and, such determination could not be revised on habeas corpus, it is nevertheless true that we have no such decision here, and the order of removal cannot be sustained in its absence. Nor can the exclusion of the evidence offered be treated as mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution.

This conclusion is fatal to the order and warrant of removal and requires a reversal of the judgment below and the discharge of appellant."

In Morse vs. United States, *supra,* Mr. Justice Sutherland stated that the indictment was before the commissioner as evidence only for the purpose of establishing or tending to establish the commission of a crime.

In *Pierce v. Crecy, supra,* Mr. Justice Moody points out that in that case,

"The only condition which it is insisted is absent is the charge of a crime. The only evidence of a charge of crime is the indictment, *and the contention to be examined is that the indictment is insufficient proof that a charge has been made.*"

He then points out the distinction between attacking the indictment as a criminal pleading, and as a fact in the proofs evidential of probable cause, saying that

"Counsel conceded that they cannot successfully attack the indictment except by showing that it does not charge a crime."

In *Henry v. Henkel, supra,* Mr. Justice Lamar concedes the right of an accused to attack the indictment as not charging a crime, in the following language:

"The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute *making an offense of the acts charged.* In such cases the committing Court would have no jurisdiction, the prisoner would be in custody without warrant of law, and therefore entitled to his discharge. Green v. Henkel, 183 U. S. 261, 46 L. ed, 189, 22 Sup. Ct. Rep. 218."

Beavers v. Henkel (1903), 194 U. S. 76, cites the case *Green v. Henkel,* 183 U. S. 249, and recognizes the practice permitted both before the Commissioner and the removal Court on *habeas corpus* of the accused's rights to introduce evidence on the question of probable cause in rebuttal of the *prima facie* proof of the indictment.

In Greene v. Henkel (1901), 183 U. S. 261, the accused was permitted to attack the indictment as not charging a crime, but this court held on other evidence being introduced that probable cause was shown.

Every case referred to by petitioner with the exception of Hyde v. Shine (1904), 199 U. S. 62; Horner vs. United States (1891), 143 U. S. 570; and Hughes v. Gault (1925), 271 U. S. 142, herein has been analyzed; and it is submitted none of the cases sustain his contention, but are authorities for the proposition that the remanding court may discharge the accused if the indictment does not charge a crime or all the evidence does not show probable cause that a crime exists.

Hyde vs. Shine, supra, is in accord with the law as stated by the Circuit Court of Appeals on the authority of Pierce vs. Creecy, supra; Rodman vs. Pothier, supra and Morse vs. United States, supra. Mr. Justice Brown on page 84 says:

"In the Federal courts, however, it is well settled

that upon habeas corpus the court will not weigh the evidence, *although if there is an entire lack of evidence to support the accusation the court may order his discharge.* In this case, however, the production of the indictment made at least a prima facie case against the accused, and if the commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause."

The dissenting opinion by Mr. Justice Peckham concurred in by Justices White and McKenna, says, page 86:

"The indictment constitutes prima facie evidence of probable cause, but evidence may be given to rebut it."

The learned Justice further says on page 87:

"The right is none the less, when the want of probable cause rests upon conclusive evidence of the absence of the defendants from the district at the time when the indictment alleges the conspiracy was formed in such district. If defendants were not then there, they could not be guilty of the crime charged in the indictment."

The dissenting opinion closes with the following sentence:

"The enforcement of the criminal law should not be made oppressive in such cases, and, therefore, when it appears there was no probable cause to found the indictment upon, the order of removal should be refused."

In Horner vs. United States, supra, the accused was not arrested on a warrant after indictment found, but was

arrested on complaint on oath of a post office inspector before a United States commissioner. On habeas corpus it was contended that the circular set forth in the complaint is not included in the prohibition of Sec. 3894, of the Revised Statutes (against lottery) and that the accused committed no offense by depositing the circular in the mail. The Circuit Court dismissed the petition and an appeal or writ of error was taken direct to this court under Section 5 of the Act of March 3, 1891, because the constitutionality of the Statute was drawn in question.

This court in an opinion by Mr. Justice Blatchford, on page 577, said:

> "But we are of opinion that that question ought not to be reviewed by us on this appeal. The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. He is now held to await the action of a grand jury. His case is in the regular course of criminal adjudication. It is not proper for this court on this appeal, nor was it proper for the Circuit Court, on the writ of habeas corpus, to determine the question as to whether the scheme was a lottery."

In Hughes vs. Gault, supra, the indictment was held sufficient and the accused remanded. Mr. Justice Holmes on page 151 says:

> "We do not regard the attack upon the indictment as needing discussion. It has been upheld by a number of district courts and by the circuit court of appeals for the sixth circuit as sufficient for removal purposes."

The question there presented was whether or not the refusal of the commissioner to admit evidence of inno-

cence was deprivation of a *constitutional* in contradictinction to a *statutory* right under the constitution.

Mr. Justice Holmes after pointing out on page 149 that "the Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the court having jurisdiction of the charge," then points out

> "'In Tinsley v. Treat, 205 U. S. 20, 33, 51 L. ed. 689, 695, 27 Supp. Ct. Rep. 430, the conclusion is not that the appellant by being denied the right to present any evidence was deprived of his rights under the Constitution, but that he was denied 'a right secured by statute under the constitution'."

It should be pointed out that in this case, Mr. Justice Brandeis in his dissent was of opinion that

> "by refusing to hear and to consider evidence introduced or offered which bore upon the existence of probable cause, the commissioner * * * deprived the petitioner of his liberty without due process of law in violation of the 5th Amendment, because he was denied a fair hearing."

Reference here should be made to Circuit Judge Woolley's conception of the law as stated by this court in Hughes vs. Gault, supra. In United States vs. Mathues (1927), 19 Fed. Rep. (2nd) 23, after referring to this case "as the latest authoritative announcement on the subject," he says "The law of that case and of other cases there approved * * * is substantially as follows:

> "One accused of crime by indictment in a distant district, though liable to trial wherever indicted, cannot be arbitrarily and summarily removed from the district of his residence, but is entitled to a prelimin-

ary hearing. Such preliminary hearing is not a preliminary trial. It is had before a committing magistrate, who may be a judge, commissioner, mayor of a city, or justice of the peace, and it is only such as will bring out the probable cause of the charge and make certain the identity of the defendant. These are the two things that must be established before the accused can be lawfully removed. In such a hearing the function of the magistrate is not ministerial but is judicial in the limited sense indicated. He must pass on the question of identity—an issue purely of fact—and also on that of probable cause. The indictment is itself evidence that there was probable cause for finding it. Of this, however, the indictment is not conclusive. Tinsley v. Treat, 205 U. S. 20, 32, 27 S. Ct. 430, 51 L. Ed. 689; its evidential effect is only prima facie. Hence the accused may attack it as not charging a crime and therefore as not showing probable cause."

III.

THE QUESTIONS PROPOUNDED AS SET FORTH IN THE COUNTS OF THE INDICTMENT ARE NOT PERTINENT TO THE INVESTIGATION AUTHORIZED BY THE SENATE.

The ultimate contention of petitioner is that the pertinency of the questions propounded should have been left to the determination of the trial court and this because the remanding court is without jurisdiction in the premises. This contention ignores the conclusion of this court, that the question of pertinency is one of law and not of fact and that the burden of proving pertinency is on the petitioner.

QUESTION OF PERTINENCY IS OF LAW FOR THE COURT.

Petitioner would seem to suggest that because there is some question of fact, the determination of pertinency should be remanded to the trial court.

This court in *Sinclair vs. United States* (1928) 279 U. S. 263, in an opinion by Mr. Justice Butler, held in analogy to relevancy and materiality that the question of pertinency arising under Section 102 of the Revised Statutes was *of law for the court;* and what is particularly applicable to the instant case,

> "That it would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury."

In this case it has always been the contention of the respondent that the question of pertinency was one of law for the court and not one of fact for the jury; and that the pertinency of the questions being free of doubt, it is clear as matter of law that no crime was charged in the indictment.

Petitioner in the petition for rehearing suggests that the Sinclair case "also presents reasons why your Honorable Court may be disposed to consider the propriety of granting a reargument". The Sinclair case did not decide, as petitioner would leave this court to believe, that in removal proceedings the trial court must, and the court of asylum may not decide this question. No question of removal on habeas corpus proceedings arose. The question there was raised by counsel taking the position that the question of pertinency was one of fact for the jury in contradictinction to one of law for the Court; and this Court in analogy to questions of relevancy held that pertinency was a question of law.

Mr. Justice Butler, on page 299, says:

"The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under Sec. 102. The matter for determination in this case was whether the facts called for by the question, were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be 'pertinent to the question under inquiry.' It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury."

BURDEN OF PROOF OF PERTINENCY.

Sinclair vs. United States also settled another important and controverted question which arose at the first and second arguments of the instant case, and that is the party on whom rests the burden of showing the pertinency of the questions. His Honor Circuit Judge Buffington held in *United States vs. Barry* (1928) 29 Fed. (2nd) 817, that the burden rested on the Government, saying on page 821,

"But a ruling on the admissibility of evidence is not made on surmises. It is based on the ground that the burden of showing the relevancy of any testimony which is objected to is on him who proposes to give it."

Mr. Justice Butler in the Sinclair case held as matter of law that in criminal prosecution under Section 102 of the Revised Statutes the burden rests "*on the United States to plead and show that the questions pertained to some matter under investigation*". He says on page 296:

"Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the com-

mittee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation."

PERTINENCY DECIDED ONLY BY CIRCUIT COURT OF APPEALS.

The pertinency of the questions propounded has come to the attention of the District Court *Barry v. United States ex rel. Cunningham*, 25 F. (2d) 733, the Circuit Court of Appeals in an opinion filed May 17, 1929, *United States ex rel. Cunningham v. Matheus* and this court *Barry v. United States ex rel. Cunningham* (1928) 279 U. S. 597, in this removal proceeding and in the collateral senate warrant of arrest proceeding in *United States ex rel. Cunningham Appellant vs. Barry of United States Senate et al.* (1928) 29 Fed. (2nd) 817. The Circuit Court of Appeals, however, is the only court that has expressly passed upon as matter of law, the pertinency of the propounded questions.

In *United States vs. Barry, supra*, in an opinion by Judge Buffington, the Circuit Court of Appeals held that the questions were not pertinent, and in the instant case in the opinion filed by the same Judge, said:

"The entire evidence constituting the alleged crime with which the relator is charged is contained in the indictment. It consists in the refusal to answer the questions asked. The inquiry related entirely to the primary election. If the questions were pertinent to the investigation authorized by the Senate, probable cause has been established, but if

they were not pertinent, it has not been established. We recently considered the pertinency of these very questions in the case of United States ex rel. Cunningham v. Barry, 29 Fed. (2d) (817) and there said:

> 'After full consideration, we are of opinion no facts, reasons, or grounds have been shown or now appear which make pertinent the inquiry into how Cunningham made the money which he admits he contributed. That a situation might arise where the facts would show such questions were pertinent goes without saying, but under the present situation and no such facts appearing, we hold Cunningham was justified in declining to answer the questions asked him, and that this warrant, whose only foundation is alleged contempt for refusal to so answer, has no support in law. Accordingly we hold the court below was in error, and the record will be remanded with instructions to discharge the petitioner.' "

The opinion of the Circuit Court of Appeals in the Barry case is reported in 29 Fed. (2nd) 817, and the opinions of that Court after the first argument and reargument are found respectively on page 261, 33 Fed. (2d) and Appendix "A" of this brief.

Judge Dickinson in his opinion discharging the writ of habeas corpus in this case on the question of pertinency said on page (91 R.)

> "In the view we take the pertinency of the questions asked is not one by which we should determine the other question of whether this defendant should stand trial, and in consequence we should pass no opinion upon the question of pertinency further than the statement of the broad proposition that we de-

cline to rule that no substantive offence is charged in this indictment."

Petitioner in the Matheus case in his petition for a writ of certiorari page 6 says:

> "The pertinency of the questions affirmatively appears from the transcript of respondent's testimony."

and the inference might arise as contended for by petitioner on reargument, as therein stated, since "this testimony was recited in the opinion of this court in *Barry vs. United States ex rel. Cunningham* (1928) 279 U. S. 597, that this court had passed on the pertinency of the questions propounded. This court, because unnecessary in express terms refused to pass on the pertinency of the questions.

Mr. Justice Sutherland in *Barry vs. United States ex rel. Cunningham, supra,* after pointing out that the Circuit Court of Appeals had held

> "That the information sought to be elicited and which Cunningham refused to give was not pertinent to the inquiry authorized to be made by the Committee and that Cunningham was justified in declining to answer the questions in respect thereof" says in support of its conclusion of error:
>
> "We must accept this unequivocal language as expressing the purpose of the Senate *to elicit testimony in response to questions to be propounded at the bar of the Senate,* and the question whether the information sought to be elicited from Cunningham by the committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial."

The opinion then concludes:

"It is not necessary to determine whether the information sought was pertinent to the inquiry before the committee, the scope of which was fixed by the provisions of the Senate resolution. But it might well have been pertinent in an inquiry conducted by the Senate itself, exercising the full, original and unqualified power conferred by the Constitution."

Circuit Judge Buffington in the opinion of the Circuit Court of Appeals, after reargument, in determining that the Barry case did not rule the instant habeas corpus proceeding says:

"The indictment in the present case * * * concerns solely what had already taken place before a committee of the Senate. When Cunningham refused to answer the questions propounded by that committee, his crime * * * was complete and for that completed crime he was indicted. As his entire acts were set forth in the indictment, the court, on the application for removal, was required to determine whether probable cause was shown * * * we held the lack of probable cause was shown in that the inquiry made of Cunningham was not pertinent because no power had been conferred by the Senate on this committee to make such inquiry.

* * * the case of Barry v. Cunningham, supra, as held by the Supreme Court, concerned what took place afterwards, namely, the action of the Senate in attaching Cunningham and bringing him before it * * * 'to answer such questions pertinent to the matter under inquiry as the Senate * * * may propound,' * * * *It will thus be seen that so far as questions to Cunningham are concerned the indictment in the present case concerned questions already asked and refused*

to be answered, while the Barry case concerned questions to be asked in the future."

It is then evident that the Circuit Court of Appeals alone has passed on the pertinency of the questions, and that no opinion of any judge or court questions the correctness of the conclusion reached by that court as to their non-pertinency.

It is suggested that the opinion of Judge Dickinson would seem to indicate that the questions were not pertinent. It may also be argued that if either Judge Dickinson or Judge Woolley had been of opinion that any of the questions were pertinent, intimation could and probably would have been given to that effect. It may also be suggested that if this court had been of opinion that the questions were pertinent when asked by the committee, there would have been no necessity for the distinction as made by Justice Sutherland in the Barry case, and with propriety and logically this court could have finally decided that the questions were pertinent when propounded within the limitations imposed on the committee as well as when asked by the Senate itself exercising the full, original and unqualified power conferred by the Constitution.

Questions Not Pertinent.

It is deemed sufficient in considering the question of pertinency only to advert to the scope of the investigation and to the manner in which the questions by the witness were met.

Resolution 195 of the 69th Congress authorized the appointment of a Special Committee, defined the scope of its inquiry and granted to it powers incidental and necessary to the performance of its duties.

The limit of the authority of the special committee was in its language to "investigate what moneys * * * or

things of value * * * have been promised, contributed, made or expended * * * by any person, firm, corporation or committee, organization to influence the nomination of any person as a candidate * * * for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926."

The resolution then instructs the Committee to "report the names of the persons, firms or corporations, etc., * * * that have made * * * such promises * * * or payments and the amount of them * * * together with all facts in relation thereto."

The funds of money raised, the names of the contributors and the amounts contributed together with the relevant facts to influence the nomination of any person as a candidate for the United States Senate at the general election to be held in November, 1926, constitute the subject-matter and embrace the scope of the Committee's authority.

The witness testified truthfully and concisely to his official position and the different business in which he was interested; to the facts (a) of two contributions, (b) the amount of each (c) the form in which made (d) to whom and (e) when the respective contributions were made; and specifically testified that (f) the contributions were his personal donation and (g) from his personal estate.

He refused to answer any question (a) touching upon his wealth or (b) the course or (c) the manner of its accumulation or (d) out of what part of his personal estate either contribution came, or (e) how long the part contributed had been his property.

The opinion of the Circuit Court of Appeals at great length sets forth the questions which respondent answered, as well as the questions bearing on the inquiry

which he answered fully and also the questions which he did not answer because by him deemed not pertinent. The opinion then states the scope of the inquiry as follows:

> "Turning, then, to the underlying question, was Cunningham in contempt in declining to answer the questions asked? The answer to that is, Were such questions relevant to the inquiry the Committee was authorized to make? That inquiry, so far as here pertinent was 'to investigate what moneys * * * have been * * * contributed * * * by any person * * * to influence the nomination of any person as a candidate * * * for membership in the United States Senate at the General Election to be held in November, 1926.' Such being the items of inquiry, the resolution provided for a report thereof to the Senate by the Committee of such items, viz., 'said committee shall report the names of the person * * * that have made such * * * payments and the amounts by them severally contributed * * * including the methods of expenditure of said sum * * * together with all facts in relation thereof.' And that the matters so specified constituted the scope of the committee's inquiry was evidenced by the resolution providing for imposing the penalties of Revised Statute 102 upon a witness who 'having appeared refused to answer any question pertinent to the investigation heretofore authorized'."

The opinion then proceeds with careful analysis to point out that the respondent had given full testimony and complete answer on every possible element of the inquiry and that the questions propounded are not pertinent, saying:

> "Turning to the inquiry heretofore specified as authorized, we note that Cunningham, as bearing

on 'what moneys * * * have been contributed,' testified he had contributed fifty thousand dollars. As bearing on the question whether such money was contributed 'to influence the nomination of any person as a candidate for membership in the United States Senate,' he testified that he paid the money to Thomas F. Watson, treasurer of a political organization which was supporting the Vare for nomination for United States Senator and Beidleman for Governor; that while he favored and supported Vare as a candidate his whole object in giving the money was to assist Beidleman, and if Beidleman 'had not been on the ticket I would not have given it.' Touching the subject of investigation described as 'including the method of expenditure of said sums,' Cunningham testified he did not know whether his contribution had been reported in Beidleman's campaign expenses, adding 'I instructed Mr. Watson what my thought was about it.' It will thus be seen that Cunningham answered the questions asked him on the subjects specified in the resolution and that his answers enabled the committee, so far as the inquiry concerned him to fulfill the specified duties of their appointment, viz: to 'report * * * payments and the amount by them severally contributed * * * including the method of expenditure of said sums.' Such being the case, we do not see that proof of how Cunningham came by the money he says he thus personally contributed, could affect the objects of investigation referred to by the Senate to the Committee."

It is evident that the counts of the indictment do not disclose the essential elements of the crime charged *in that standing alone, none of the counts shows the pertinency of the questions propounded;* but clearly and without dispute of either fact or law, are not within the scope of the committee's investigation.

No effort is made in petitioner's argument to meet the burden which the law imposes on him to show the pertinency of the questions, other than to urge their pertinency to test credibility.

It may be argued that the witness having given all the information within his knowledge and contemplated under the authority of the Senate, should not be exposed on mere surmise or suspicion to a cross-examination for the purpose of testing his credibility; and that the Committee should indulge the presumption that a witness is telling the truth who voluntarily appears in discharge of his duty as a citizen before a Committee.

It is not suggested that Congress must be bound by the testimony of the witness, nor that it be precluded from asking any question that may be material or relevant to the legislative inquiry, but only urged the necessity of ending questions that impinge on his personal affairs, when the witness has given all information essential to or within the scope of the legislative inquiry and there is no known fact which impeaches the truth of his testimony.

Attention should be called to the case of Sinclair vs. United States (1928), 279 U. S. 263, for therein Mr. Justice Butler reviews the cases which emphasize the caution with which this Court will safeguard the individual against unreasonable inquiries into his personal affairs.

SUMMARY.

Respondent denies petitioner's contention that the indictment is conclusive of probable cause and that the trial court consequently has exclusive jurisdiction to determine the existence of a crime. He submits that the indictment when offered in evidence as proof of probable cause may be attacked if its counts do not charge a crime and this because the existence of a crime is the most essential element in the determination of probable cause.

The burden was on petitioner to show that the ques-

tions propounded pertained to some matter under investigation by the Senate committee; and the determination of the question of pertinency is one of law for the court of asylum and not of fact for the trial court.

The entire evidence of probable cause or its lack consists alone of the indictment and the transcript of the notes of testimony; and consequently the facts in evidence are free from doubt or dispute.

It is evident that the respondent gave to the committee all information that it was possible for him to give within the scope of its inquiry or that could aid it in any manner in the performance of its duties; and it is crystal clear that the questions by him not answered related to personal affairs of the most delicate nature, and properly regarded by all men as sacred.

It is further suggested that this court is without jurisdiction because paragraphs "a" and "b" of Section 240 of the Judicial Code, as amended by the Act of February 13th, 1925, following:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> (b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may at the

election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

must be read together, and neither the Constitution nor any statute is construed. Paragraph "a" does not enlarge the jurisdiction; it permits direct appeal in any criminal or civil case only when appeal is allowed by the other sections.

In conclusion, it is submitted that the pivotal inquiring in this proceeding then is, whether the questions propounded are pertinent; and it is suggested that this is so free from doubt as to permit the remanding court to conclude, as stated by the Circuit Court of Appeals, that "the indictment's prima facie evidence of probable cause is overcome by its own terms in failing to charge a crime."

The petition should be dismissed.

All of which is respectfully submitted.

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APPENDIX "A".

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 3857. October Term, 1928.

UNITED STATES OF AMERICA EX REL.
THOMAS W. CUNNINGHAM,
Appellant,

v.

W. FRANK MATHUES, UNITED STATES MARSHAL,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Filed June 13, 1930.)

Before BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges.*

BUFFINGTON, *J.*

After the opinion of this Court was filed, the case of Barry v. Cunningham, 279 U. S. 597, was decided. Thereupon the Government, conceiving that our decision was at variance with the holdings of the Supreme Court in that case, moved a rehearing be had. The motion was granted and such rehearing was given. On due consideration the members of the Court adhere to their views already ex-

pressed in the opinion and the dissent heretofore filed. We therefore confine the present opinion to a brief statement of why we do not regard the Barry case as ruling the present one. The indictment in the present case in the Federal Court for the District of Columbia concerns solely what had already taken place before a Committee of the Senate. When Cunningham refused to answer the questions propounded by that Committee, his crime of contempt, if such it be, was complete and for that completed crime he was indicted. As his entire acts were set forth in the indictment, the Court, on the application for removal, was required to determine whether probable cause was shown. On that question we held the lack of probable cause was shown in that the inquiry made of Cunningham was not pertinent because no power had been conferred by the Senate on this Committee to make such inquiry.

On the other hand, the case of Barry v. Cunningham, *supra*, as held by the Supreme Court, concerned what took place afterwards, namely the action of the Senate in attaching Cunningham and bringing him before it "then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said Committee, or the President of the Senate, may propound," etc. It will thus be seen that so far as questions to Cunningham are concerned the indictment in the present case concerned questions already asked and refused to be answered, while the Barry case concerned questions to be asked in the future. In deciding the case before it, the Supreme Court explicitly stated what it did and what it did not decide, namely,

> "We must accept this unequivocal language as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited from Cunningham by the committee was pertinent to the inquiry which the commit-

tee had been directed to make may be put aside as immaterial.

"It results that the following are the sole questions here for determination: (1) whether the Senate was engaged in an inquiry which it had constitutional power to make; (2) if so, whether that body had power to bring Cunningham to its bar as a witness by means of a warrant of arrest; and (3) whether as a necessary prerequisite to the issue of such warrant of arrest a subpoena should first have been served and disobeyed."

This question of the pertinency of those questions, which the Supreme Court thus stated it did not pass upon, is the very question which we did then pass upon and which we are now constrained to pass upon in the present case. Adhering, as we have said, to the respective views heretofore held on that question, we adhere to our previous opinion and in doing so, we do not, in our view, disregard the holdings of the Supreme Court.

A true Copy:

Teste:

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Clerk of the United States Circuit Court of Appeals for the Third Circuit.